TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 667

ANNISTON MANUFACTURING COMPANY,
PETITIONER,

vs.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 21, 1937.

CERTIORARI GRANTED FEBRUARY 15, 1937.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 23, 1937.
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[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

At Law. No. 4595

ANNISTON MANUFACTURING COMPANY, a Corporation,

v.

HARWELL G. DAVIS, Collector of Internal Revenue

COMPLAINT—Filed November 22, 1935

To the District Court of the United States for the Northern District of Alabama:

Now comes the Plaintiff, Anniston Manufacturing Company, a corporation, and respectfully shows to this Honorable Court the following facts:

First Count

1

Plaintiff is a corporation organized and existing under the laws of the State of Alabama, and having its principal place of business at Anniston, Calhoun County, Alabama.

2

Defendant is a citizen of the United States, and a resident and inhabitant of Jefferson County, within this District and Division.

[fol. 2]

3

Defendant is now and has been United States Collector of Internal Revenue for the District of Alabama since July 3, 1933.

4

This is a suit of a civil nature arising under the Constitution and laws of the United States, and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

5

Defendant is indebted to Plaintiff in the principal sum of $257,935.77, together with interest thereon from the dates of payment hereinafter shown by reason of the facts set forth in the following paragraphs:

6

Defendant has collected from Plaintiff as cotton processing taxes, under the Agricultural Adjustment Act of 1933, Title 1, Public Law No. 10, 73rd Congress, approved May 12, 1933, the sum of $257,935.77 in the following installments, and on the dates of payment indicated, and for the periods stated:

[fol. 3]

Year	Month	Amount of Assessment	Date Paid	Payment Amount	Total
1933	August	$14,115.65	9/29/33	$4,705.22	
			10/30/33	4,705.22	
			11/29/33	4,705.21	$14,115.65
	September	12,058.83	10/30/33		12,058.83
	October	13,699.14	11/29/33		13,699.14
	November	15,708.51	12/30/33		15,708.51
	December	11,711.70	1/30/34		11,711.70
1934	January	17,479.43	2/26/34		17,479.43
	February	14,345.14	4/25/34		14,345.14
	March	15,810.31	5/26/34		15,810.31
	April	15,853.03	6/25/34		15,853.03
	May	16,717.43	7/28/34		16,717.43
	June	11,885.79	8/25/34		11,885.79
	July	4,912.49	9/28/34		4,912.49
	September	1,807.09	11/28/34		1,807.09
	October	15,718.37	12/24/34		15,718.37
	November	15,773.44	1/26/35		15,773.44
	December	12,956.16	2/26/35		12,956.16
1935	January	16,736.45	3/27/35		16,736.45
	February	14,742.67	4/29/35		14,742.67
	March	15,904.14	5/30/35		15,904.14
	Totals	$257,935.77			$257,935.77

7

The amounts collected from Plaintiff as processing taxes, described above, were claimed by said Defendant to be due under Section 9(a) of said Agricultural Adjustment Act by reason of the first domestic processing of cotton by Plaintiff as processor during the months stated.

8

The Secretary of Agriculture, acting pursuant to the provisions of Section 9(a) of said Agricultural Adjustment

[fol. 4] Act, issued a proclamation on July 14, 1933, which proclamation reads as follows:

"I, Henry A. Wallace, Secretary of Agriculture of the United States of America, acting under and pursuant to an Act of Congress known as the Agricultural Adjustment Act, approved May 12, 1933, as amended, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to cotton, a basic agricultural commodity."

The above is the only proclamation issued by the Secretary of Agriculture under said Section, proclaiming the determination that rental or benefit payments were to be made with respect to cotton.

9

The Secretary of Agriculture made no findings of fact and no statement of the grounds of his action in connection with his determination that rental and/or benefit payments were to be made with respect to cotton, and in issuing the proclamation quoted in paragraph 8.

10

Pursuant to Section 9(a) of said Agricultural Adjustment Act the Secretary of Agriculture issued regulations ascertaining and prescribing that for the purpose of said Act the first marketing year for cotton following the proclamation of July 14, 1933, described in paragraph 8 above, should begin August 1, 1933, on which date the processing tax became effective under Section 9(a) of said Act.

11

Pursuant to Section 9(a) of said Agricultural Adjustment Act, the Secretary of Agriculture, on July 14, 1933, [fol. 5] issued regulations determining, as of August 1, 1933, that the processing tax on the first domestic processing of cotton should be at the rate of $.042 per pound of lint cotton, net weight.

12

The sums collected from Plaintiff as processing taxes, described in paragraph 6 above, were collected at said rate

of $.042 per pound of lint cotton processed by Plaintiff during the months indicated in paragraph 6.

13

Plaintiff filed with Defendant a claim for refund on Treasury Department Form PT-24 covering all of the payments described in paragraph 6 above. Said claim for refund was filed on June 12, 1935. In said claim for refund Plaintiff assigned as the reasons for which the said claim should be allowed all of the grounds which are set up in this suit in paragraphs 15, 16, 17, 18, 19, 20, 21, 22 and 23.

14

The claim for refund referred to in paragraph 13 was rejected by the Commissioner of Internal Revenue on August 16, 1935.

15

The processing taxes collected from the Plaintiff as alleged in paragraph 6 hereof were illegally and erroneously collected because the provisions of the Agricultural Adjustment Act of 1933 (Title I, Public Law No. 10, 73rd Congress) imposing the processing tax are unconstitutional and void for the reasons set out in paragraph 16, 17, 18, 19, 20 and 21 hereof.

16

[fol. 6] The provisions of the Act imposing the processing tax are in violation of Article 1, Section 1, and Article 1, Section 8, clause 1 of the Constitution of the United States, and are unconstitutional and void because they constitute an improper and unlawful delegation to the Secretary of Agriculture of legislative power, particularly in the following respects:

(a) Under the provisions of Sections 8(1) and 9(a) of the Act, the question of whether processing taxes will or will not be imposed, and the question of whether and when processing taxes will be discontinued, is left to the unfettered and uncontrolled discretion of the Secretary of Agriculture, since no policy is declared and no standard set up as to whether, when, or in what circumstances or under what conditions, the Secretary of Agriculture shall determine upon and proclaim the making or the discontinuance

of benefit payments and thereby cause the processing tax to become effective or to cease, and no findings of fact, as to any required basis or as to the existence of any required circumstances or conditions are required as a condition of making such determination and proclamation, and no duty is imposed on the Secretary of Agriculture to make or not to make such determination and proclamation.

(b) Section 8(1) of the Act, from which the processing tax provisions of the Act are inseparable, undertakes to give the Secretary of Agriculture power to provide for rental or benefit payments to farmers "in such amounts as the Secretary deems fair and reasonable", and no policy is declared and no standard set up as to the Secretary of Agriculture's determination in this regard.

(c) Sub-sections (a), (b) and (c) of Section 9 of the Act undertake to confer upon the Secretary of Agriculture [fol. 7] the power of ascertaining the rates for processing taxes without providing a sufficiently definite standard or outline.

(d) Section 9(a) of the Act also undertakes to confer upon the Secretary of Agriculture the power to adjust processing tax rates from time to time when the Secretary finds such adjustment necessary to effectuate the declared policy of the Act which is too vague and obscure to furnish a valid standard for the exercise of delegated legislative power.

(e) Section 9(b) of the Act undertakes to confer upon the Secretary of Agriculture the power to change processing tax rates regardless of commodity prices, in order to prevent accumulation of surplus stocks that might result from the imposition of the tax at other rates, without defining the accumulation of surplus stocks.

(f) Section 9(a) of the Act undertakes to give the Secretary of Agriculture power to "ascertain" the marketing year for which processing taxes are to be effective, without providing any standard to govern the Secretary's ascertainment.

17

The provisions of the Act imposing the processing tax are in violation of the Tenth Amendment to the Constitution of the United States and are unconstitutional and

void because those provisions are an inseparable and integral part of the Act as a whole and the primary purpose and effect of the Act is (1) to regulate and control the business of agriculture and industries employing agricultural products, (2) to fix and regulate prices of commodities, and (3) regulate and control the production of agricultural products and to fix the prices thereof; whereas, if any such powers of regulation exist, they are reserved [fol. 8] to the states under the provisions of the Tenth Amendment to the Constitution of the United States.

18

The provisions of the Act imposing the processing tax are in violation of the due process clause of the Fifth Amendment to the Constitution of the United States and are unconstitutional and void because those provisions are an inseparable and integral part of the Act as a whole and the primary purpose and effect of the Act is (1) to regulate and control the business of agriculture and industries employing agricultural products, which business and industries are not so affected with a public interest as to warrant such governmental regulation or control; and (2) to fix and regulate prices of commmodities, which commodities are not so affected with a public interest as to warrant such governmental price fixing and regulation; and (3) to regulate and control the production of agricultural products and to fix and regulate the prices of agricultural products, although the production and prices of such agricultural products are not so affected with a public interest as to warrant such governmental price fixing and regulation.

19

The provisions of the Act imposing the processing tax are not authorized by Article 1, Section 8 or by any other provision of the Constitution of the United States, and are unconstitutional and void since the proceeds to be derived from the processing tax are not to be applied for a public purpose but are rather to be applied for the benefit of a single class of individuals.

[fol. 9]

20

The processing taxes collected from the Plaintiff as alleged in paragraph 6 hereof, were collected illegally, errone-

ously, and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and in violation of Article 1, Section 1 and Article 1, Section 8, Clause 1 of the Constitution of the United States, because the proclamation of the Secretary of Agriculture, dated July 14, 1933, that rental and/or benefit payments should be made with respect to cotton, contains no findings of fact and no statement of the grounds of the Secretary of Agriculture's action in determining that such payments should be made, and no such findings of fact or statement of grounds were made by the Secretary of Agriculture. Under the terms of the Act that proclamation made the cotton processing taxes effective.

21

The processing taxes collected from the Plaintiff as alleged in paragraph 6 hereof, were collected illegally, erroneously and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and in violation of Article 1, Section 1 and Article 1, Section 8, Clause 1 of the Constitution of the United States, because in "ascertaining" the marketing year for which cotton processing taxes should be effective, the Secretary of Agriculture made no findings of fact or statement of grounds as to the basis of his action in determining such marketing year.

22

The processing taxes collected from the Plaintiff as alleged in paragraph 6 hereof were collected illegally, erroneously and in violation of the provisions of the Agricultural Adjustment Act of 1933 because the said processing taxes were collected from the Plaintiff at a rate which was illegal and excessive, in that the Secretary of Agriculture acted arbitrarily and with abuse of his discretion in fixing the "'fair exchange value" of cotton, under Section 9 of the Act, at a figure grossly in excess of the price that would give cotton the same purchasing power, with respect to articles that farmers buy, as cotton had during the base period specified in Section 2 of the Act.

[fol. 10]

23

The processing taxes collected from the Plaintiff, as alleged in paragraph 6 hereof, for the marketing year begin-

ning August 1, 1934, were collected illegally, erroneously and in violation of the provisions of the Agricultural Adjustment Act of 1933 in that the Secretary of Agriculture failed to provide for a change of the rate of processing taxes for the marketing year beginning August 1, 1934, so as to give effect to the increase in the "current average farm price" of cotton at the beginning of said marketing year, the available statistics of the Department of Agriculture indicating that at the beginning of said marketing year the "current average farm price" of cotton was 13.1¢ per pound and "fair exchange value" of cotton was 15.3¢ per pound, upon the basis of which the rate of the processing taxes for the marketing year beginning August 1, 1934, should, under Section 9(b) of the Act, be only 2.2¢ per pound instead of 4.2¢ per pound as prescribed by the Secretary of Agriculture.

Wherefore, Plaintiff prays that process issue requiring Defendant to be and appear at the next term of this Honorable Court, to answer this petition, and Plaintiff prays [fol. 11] further for judgment against said Defendant in the principal sum of $257,935.77, with interest at 6% per annum on the sums scheduled in paragraph 6 above from the dates of payment thereof, as indicated.

Second Count

1

Plaintiff is a corporation organized and existing under the laws of the State of Alabama, and having its principal place of business at Anniston, Calhoun County, Alabama.

2

Defendant is a citizen of the United States, and a resident and inhabitant of Jefferson County, within this District and Division.

3

Defendant is now and has been United States Collector of Internal Revenue for the collection District of Alabama since July 3, 1933.

4

This is a suit of a civil nature arising under the Constitution and laws of the United States, and the matter in

controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

5

Defendant is indebted to Plaintiff in the principal sum of $11,918.28, together with interest thereon from the dates of payment hereinafter shown by reason of the facts set forth in the following paragraphs:

[fol. 12] 6

As Collector of Internal Revenue, Defendant has collected from Plaintiff as cotton floor stock taxes under the Agricultural Adjustment Act of 1933, Title I, Public Law No. 10, 73rd Congress, approved May 12, 1933, the total amount of $11,918.28 in the following installments and on the dates indicated:

Amount of Assessment	Payment		
	Date Paid	Amount	Total
$11,918.28	8/29/33	$2,979.57	
	9/30/33	296.27	
	10/30/33	1,637.92	
	11/29/33	1,637.91	
	11/29/33	5,366.61	$11,918.28

7

The amounts collected from Plaintiff as cotton floor stock taxes, described above, were claimed by said Defendant to be due under Section 16(a) (1) of said Agricultural Adjustment Act of 1933 by reason of Plaintiff's holding, on August 1, 1933, certain articles processed wholly or in chief value from cotton, with respect to which a processing tax was to be levied under Section 9 of said Agricultural Adjustment Act.

8

The Secretary of Agricultural acting pursuant to the provisions of Section 9(a) of said Agricultural Adjustment Act, issued a proclamation on July 14, 1933, which proclamation reads as follows:

"I, Henry A. Wallace, Secretary of Agriculture of the United States of America, acting under and pursuant to [fol. 13] the Act of Congress known as the Agricultural

Adjustment Act, approved May 12, 1933, as amended, have determined and hereby proclaim that rental and/or benefit payments are to be made with respect to cotton, a basic agricultural commodity."

The above is the only proclamation issued by the Secretary of Agriculture under said Section, proclaiming the determination that rental or benefit payments were to be made with respect to cotton.

9

The Secretary of Agriculture made no findings of fact and no statement of the grounds of his action in connection with his determination that rental and/or benefit payments were to be made with respect to cotton, and in issuing the proclamation quoted in paragraph 8.

10

Pursuant to Section 9(a) of said Agricultural Adjustment Act, the Secretary of Agriculture issued regulations ascertaining and prescribing that for the purposes of said Act the first marketing year for cotton following the proclamation of July 14, 1933, described in paragraph 8 above, should begin August 1, 1933, on which date the processing tax became effective under Section 9(a) of said Act, and the floor stock tax became effective under Section 16 of said Act.

11

Pursuant to Section 9(a) of said Agricultural Adjustment Act, the Secretary of Agriculture, on July 14, 1933, issued regulations determining, as of August 1, 1933, that the processing tax on the first domestic processing of cotton should be at the rate of $.042 per pound of lint cotton, net weight.

[fol. 14]

12

The sums collected from Plaintiff as floor stock taxes described in paragraph 6 above, were collected at a rate of $0.044184 per pound of net cotton content of articles processed from cotton, and held by Plaintiff on August 1, 1933. Said floor stock tax rate was fixed by said Secretary of Agriculture, acting under Section 10(c) of said Agricul-

tural Adjustment Act, based upon the processing tax rate of $.042 per pound, described in paragraph 11 above.

13

On June 12, 1935, Plaintiff filed with Defendant claim for refund on Treasury Department Form PT-24. Said claim for refund covered all of the payments described in paragraph 6 above. In said claim for refund Plaintiff assigned as the reasons for which said claim should be allowed all of the grounds which are set up in paragraphs 15, 16, 17, 18, 19, 20, 21, 22 and 23 of this petition.

14

The claim for refund, referred to in paragraph 13, was rejected by the Commissioner of Internal Revenue on August 16, 1935.

15

The floor stock taxes collected from the Plaintiff as alleged in paragraph 6 hereof were illegally and erroneously collected because the provisions of the Agricultural Adjustment Act of 1933 (Title I, Public Law No. 10, 73rd Congress) imposing the floor stock tax are unconstitutional and void for the reasons set out in paragraphs 16, 17, 18, 19, 20, 21 and 22 hereof.

[fol. 15] 16

The provisions of the Act imposing the floor stock tax are in violation of Article 1, Section 1, and Article 1, Section 8, Clause 1, of the Constitution of the United States, and are unconstitutional and void because they constitute an improper and unlawful delegation to the Secretary of Agriculture of legislative power, particularly in the following respects:

(a) Under the provisions of Sections 8(1), 9(a), and 16 of the Act, the question of whether floor stock taxes will or will not be imposed is left to the unfettered and uncontrolled discretion of the Secretary of Agriculture, since no policy is declared and no standard set up as to whether, when, or in what circumstances or under what conditions, the Secretary of Agriculture shall determine upon and proclaim the making of benefit payments and thereby cause

the floor stock tax to become effective, and no findings of fact, as to any required basis or as to the existence of any required circumstances or conditions, are required as a condition of making such determination and proclamation, and no duty is imposed on the Secretary of Agriculture to make or not to make such determination and proclamation.

(b) Section 8(1) of the Act, from which the floor stock tax provisions of the Act are inseparable, undertakes to give the Secretary of Agriculture power to provide for rental or benefit payments to farmers "in such amounts as the Secretary deems fair and reasonable", and no policy is declared and no standard set up as to the Secretary of Agriculture's determination in this regard.

(c) Sub-sections (a), (b) and (c) of Section 9, and Section 16, of the Act undertake to confer upon the Secretary [fol. 16] of Agriculture the power of ascertaining the rates for floor stock taxes without providing a sufficiently definite standard or outline.

(d) Section 9(a) of the Act undertakes to give the Secretary of Agriculture power to "ascertain" the marketing year for which processing, and therefore floor stock, taxes are to be effective without providing any standard to govern the Secretary's ascertainment.

17

The provisions of the Act imposing the floor stock tax are in violation of the Tenth Amendment to the Constitution of the United States and are unconstitutional and void because those provisions are an inseparable and integral part of the Act as a whole and the primary purpose and effect of the Act is (1) to regulate and control the business of agriculture and industries employing agricultural products, (2) to fix and regulate prices of commodities, and (3) to regulate and control the production of agricultural products and to fix the prices thereof; whereas, if any such powers of regulation exist, they are reserved to the states under the provisions of the Tenth Amendment to the Constitution of the United States.

18

The provisions of the Act imposing the floor stock tax are in violation of the due process clause of the Fifth

Amendment to the Constitution of the United States and are unconstitutional and void because those provisions are an inseparable and integral part of the Act as a whole and the primary purpose and effect of the Act is (1) to regulate and control the business of agriculture and industries employing agricultural products, which business and industries are not so affected with a public interest as to warrant such governmental regulation or control; and (2) [fol. 17] to fix and regulate prices of commodities, which commodities are not so affected with a public interest as to warrant such governmental price fixing and regulation; and (3) to regulate and control the production of agricultural products and to fix and regulate the prices of agricultural products, although the production and prices of such agricultural products are not so affected with a public interest as to warrant such governmental price fixing and regulation.

19

The provisions of the Act imposing the floor stock tax are in violation of Article 1, Section 2, Paragraph 3, and Article 1, Section 9, Paragraph 4, of the Constitution of the United States, and are unconstitutional and void, because the floor stock tax is a direct tax on property not apportioned among the several states according to the number of their respective citizens as shown by the United States census.

20

The provisions of the Act imposing the floor stock tax are not authorized by Article 1, Section 8, or by any other provision of the Constitution of the United States, and are unconstitutional and void since the proceeds to be derived from the floor stock tax are not to be applied for a public purpose but are rather to be applied for the benefit of a single class of individuals.

21

The floor stock taxes collected from the Plaintiff as alleged in paragraph 6 hereof, were collected illegally, erroneously, and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and in violation of Article 1, Section 1, and Article 1, Sec-

[fol. 18] tion 8, Clause 1, of the Constitution of the United States, because the proclamation of the Secretary of Agriculture, dated July 14, 1933, that rental and/or benefit payments should be made with respect to cotton, contains no findings of fact and no statement of the grounds of the Secretary of Agriculture's action in determining that such payments should be made, and no such findings of fact or statement of grounds were made by the Secretary of Agriculture. Under the terms of the Act that proclamation made the cotton floor stock taxes effective.

22

The floor stock taxes collected from the Plaintiff as alleged in paragraph 6 hereof, were collected illegally, erroneously and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States and in violation of Article 1, Section 1, and Article 1, Section 8, Clause 1, of the Constitution of the United States, because in "ascertaining" the marketing year for which cotton processing taxes, and therefore cotton floor stock taxes, should be effective, the Secretary of Agriculture made no findings of fact or statement of grounds as the basis of his action in determining such marketing year.

23

The floor stock taxes collected from the Plaintiff as alleged in paragraph 6 hereof were collected illegally, erroneously and in violation of the provisions of the Agricultural Adjustment Act of 1933 because the said floor stock taxes were collected from the Plaintiff at a rate which was illegal and excessive, in that the Secretary of Agriculture acted arbitrarily and with abuse of his discretion in fixing the "fair exchange value" of cotton, under Section 9 of [fol. 19] the Act, at a figure grossly in excess of the price that would give cotton the same purchasing power, with respect to articles that farmers buy, as cotton had during the base period specified in Section 2 of the Act.

Wherefore, Plaintiff prays that process issue requiring Defendant to be and appear at the next term of this Honorable Court to answer this petition, and Plaintiff prays further for judgment against said Defendant in the principal sum of $11,918.28, with interest at 6% per annum on the

sums scheduled in paragraph 6 above from the dates of payment thereof, as indicated.

W. A. Sutherland, Atlanta, Georgia; Joseph B. Brennan, Attorneys for Plaintiff. Sutherland, Tuttle & Brennan, First National Bank Bldg., Atlanta, Georgia.

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed April 22, 1936

Now comes the defendant in the above entitled cause and by leave of Court first had and obtained withdraws the de-
[fol. 20] murrer heretofore filed in said cause and substitutes and files in lieu of said demurrer this motion to dismiss this cause because of a lack of jurisdiction in the Court to entertain the same and because of the following separate and several matters. In support of said motion to dismiss, the defendant says separately and severally as follows:

1. This Court is without jurisdiction to hear and determine this action for the following reasons:

A. The Agricultural Adjustment Act, c. 25, 48 Stat. 31, as amended by the Act of August 24, 1935, c. 641, 49 Stat. 730, in Section 21 (d) provides:

"(d) (1) No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counterclaim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to

which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In [fol. 21] any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the Court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930."

The effect of this section, as a matter of law, is to deprive the court of jurisdiction where the plaintiff has, as in this case, failed to submit his proof to the Commissioner of Internal Revenue on the question of whether the plaintiff has borne the burden of the amount of any tax, penalty, or interest imposed by Title 1 of the Agricultural Adjustment Act sought to be recovered, to-wit, that he has neither directly nor indirectly included any amount of such tax, penalty, or interest in the price of the article with respect to which it was imposed or any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any person in any manner, or included any such amount in the charge or fee for processing, and that the price paid by the plaintiff or such person was not reduced by any such amount.

B. The plaintiff does not allege any facts to show that it has complied with the requirements of section 21 (d) of said Act of August 24, 1935, above referred to.

C. The plaintiff has not alleged that a hearing has been held on its claim before the Commissioner of Internal Revenue, that any proof was submitted by plaintiff to, or that any finding was made by, the Commissioner of Internal [fol. 22] Revenue as to whether or not plaintiff has borne the burden of any amount of any tax, penalty, or interest assessed against or collected from plaintiff under the Agricultural Adjustment Act, herein sought to be recovered; or that a transcript of a hearing before the Commissioner of Internal Revenue has been duly certified and filed as the

record in the case as required by said Act of August 24, 1935.

2. Plaintiff's said complaint does not state facts sufficient to constitute a cause of action against this defendant for the following reasons:

A. Plaintiff has failed to allege any facts showing compliance with the provisions of Section 21 (d) (1) of the Agricultural Adjustment Act as amended by the Act of August 24, 1935, and any recovery against this defendant is therefore barred.

B. Plaintiff therein has failed to allege that it has, after the filing of a claim for refund or credit of any tax, penalty, or interest imposed by Title 1 of the Agricultural Adjustment Act as amended, whether accrued before, on, or after the date of the adoption of the Act of August 24, 1935, established to the satisfaction of the Commissioner of Internal Revenue—

(1) That neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included any amount of any such tax, penalty, or interest in the price when sold of the article with respect to which said tax, penalty, or interest was imposed or of any article processed from the commodity with respect to which it was imposed.

(2) That neither the claimant nor any person directly or [fol. 23] indirectly under his control or having control over him, has, directly or indirectly, passed on any amount of any such tax, penalty, or interest to the vendee or to any other person in any manner.

(3) That neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included any amount of any such tax, penalty, or interest in the charge or fee for processing.

(4) That the price paid by claimant or any person directly or indirectly under his control or having control over him, has not been reduced by any amount of any such tax, penalty, or interest.

C. Plaintiff's said complaint does not state any facts which would warrant a judgment by the court against this defendant and in favor of plaintiff.

3. Plaintiff's said complaint and each count thereof, separately and severally, is insufficient to confer jurisdiction upon this Court to hear and determine upon the merits thereof the matters sought to be alleged therein for the following reasons:

A. It affirmatively appears from the allegations thereof that the alleged claim for a refund alleged to have been filed with the Commissioner and by him denied or rejected was insufficient to warrant its allowance by the Commissioner and is wholly inadequate to sustain a cause of action in this Court for the refusal or rejection thereof by the Commissioner.

B. It affirmatively appears from the allegations thereof that the plaintiff did not, prior to the institution of this suit, pursue its administrative remedies in the manner and to the extent required by law as a condition precedent to the filing of the action in this Court.

[fol. 24] C. The plaintiff avers that its claim for refund assigned as the reasons for which the said claim should be allowed, all of the grounds set up in said petition or complaint in paragraphs 15, 16, 17, 18, 19, 20, 21, 22 and 23 and it affirmatively appears from the allegations contained in said just mentioned paragraphs that the plaintiff, prior to institution of this suit, failed to comply with the provisions of Section 21 (d) of the Agricultural Adjustment Act as Amended by the Act of August 24, 1935, which said Section is hereinabove copied.

Jim C. Smith, United States Attorney.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO COMPLAINT—Filed June 12, 1936

Now Comes the Plaintiff above named, and, with leave of court first had and obtained, amends its complaint heretofore filed in the following particulars:

I. By adding a new paragraph to the First Count of the original complaint, to be known as paragraph 24, as follows:

[fol. 25] 24

All of the sums scheduled in paragraph 6 of the First Count of the original complaint were paid by Plaintiff to Defendant under duress and solely to prevent the imposition of penalties and seizure of Plaintiff's property. At the time of making all of said payments, except the first payment, in the sum of $4705.22, Plaintiff protested to Defendant that said taxes were illegal and unconstitutional.

II. By adding a new paragraph to the Second Count of the original complaint, to be known as paragraph 24, as follows:

24

All of the sums scheduled in paragraph 6 of the Second Count of the original complaint were paid by Plaintiff to Defendant under duress and solely to prevent the imposition of penalties and seizure of Plaintiff's property. At the time of making all of said payments, except the first two, in the sum of $2979.57 and $296.27, respectively, Plaintiff protested to Defendant that said taxes were illegal and unconstitutional.

III. By adding two new paragraphs to each of the Counts of the original complaint, to be known as paragraphs 25 and 26, respectively, as follows:

25

Plaintiff alleges that Section 21(d) of the Agricultural Adjustment Act, as Amended by the Act of August 24, 1935, can have no effect upon this suit, for the reason that if said Section should be construed to be applicable to this suit, it would be invalid on the following grounds as violative of the following constitutional provisions:

(A) Section 21(d)(1) is repugnant to the due process [fol. 26] clause of the Fifth Amendment to the Constitution, in that it undertakes to impair and destroy the vested right of action which Plaintiff had against Defendant, prior to the Act of August 24, 1935, for the recovery back of the floor stock and processing taxes which Defendant had illegally collected from Plaintiff as described in the original complaint. Said Section 21(d)(1) undertakes to impair and destroy said vested right by imposing upon processors,

as a condition precedent to recovery, the burden of proving facts which are not susceptible of proof, and the proof of which is inherently impossible in any case.

(B) Section 21(d)(1) is repugnant to the due process clause of the Fifth Amendment to the Constitution in that said Section undertakes to impose conditions, which are vague, uncertain and unintelligible, and which therefore cannot be complied with, on the recovery of floor stock and processing taxes illegally collected, and said Section thereby undertakes to impair and destroy Plaintiff's vested right of action for the recovery of such taxes.

(C) Assuming that the conditions on recovery imposed by Section 21(d)(1) are not inherently impossible to prove, said Section is repugnant to the due process clause of the Fifth Amendment to the Constitution for the reason that said Section undertakes to confiscate, and deprive the process or from recovering, the portion of such floor stock and processing taxes which has been absorbed by such processor if any part of the tax has been passed on to others or if the processor has reduced the amount paid by him for the taxable commodity by any part of the tax.

(D) Assuming that the conditions on recovery imposed by Section 21(d)(1) are not inherently impossible to prove, said Section is repugnant to the due process clause of the Fifth Amendment to the Constitution, in that the conditions imposed by said Section are arbitrary and unreasonable; [fol. 27] and even if the floor stock and processing tax had been passed on or passed back, as described in said Section 21(d)(1), Plaintiff cannot, for that reason consistently with due process of law, be deprived of the right to recover such floor stock and processing taxes as have been illegally collected from it.

(E) Section 21(d)(1) and Section 21(e) are repugnant to the due process clause of the Fifth Amendment to the Constitution, in that they arbitrarily and unreasonably restrict Plaintiff's right to a fair administrative remedy.

(F) Section 21(d)(1) is repugnant to Article III of the Constitution and to the Constitutional requirement of the separation of powers in that said Section undertakes to confer upon constitutional courts duties which are not judicial in nature and said Section also undertakes to deprive

such courts of their inherent judicial powers in matters falling within their appointed jurisdiction. The constitutional defects here enumerated result from the conclusive effect given by said Section 21(d)(1) to the findings and determination of the Commissioner of Internal Revenue.

(G) Section 21(d)(1) is repugnant to the Seventh Amendment to the Constitution, in that it in effect deprives processors of the right to a jury trial in an action against a collector of internal revenue for the recovery back of floor stock and processing taxes illegally collected, said action being one at common law against the collector personally.

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The questions whether and to what extent floor stock and processing taxes have been passed on to others by the taxpayers, and whether the price paid by processors for taxable commodities has been reduced by any part of the processing tax, and whether the taxpayers have borne the burden of any amount of such taxes, or whether they have [fol. 28] shifted such burden to others, are questions which are not susceptible of proof. The inherent impossibility of proving such matters is apparent from a consideration of the manner and methods of business and operation employed by cotton mills. The operation of a cotton mill, such as the mills operated by this Plaintiff, are described in the following subparagraphs:

(A) Lint cotton is purchased by the cotton mills in a competitive market. The prices paid for the commodity vary as to particular grades, staple, and character, and they fluctuate daily. Prices in the cotton market are affected by the extent of the demand for cotton in this country and abroad, the supply of spot cotton, Government crop reports and prognostications, changing weather conditions in the cotton belt of this country and in other cotton growing countries, world news affecting trade in general, such as boycotts, war scares, etc., and a myriad of circumstances that cannot be recognized or identified in detail. Plaintiff buys the lint cotton which it processes in such a market, and pays the market price therefor. The price which Plaintiff has paid for the cotton, upon the processing of which the taxes covered by this action were imposed, was never reduced below the market price on account of any part of such

taxes. On the other hand, Plaintiff alleges that it is impossible to ascertain whether and to what extent the imposition of said floor stock and processing taxes and the possibility of their termination or change in rate affected the market price of lint cotton, and it is therefore impossible to ascertain whether and to what extent the price paid by Plaintiff for said lint cotton was reduced on account of the imposition of said floor stock and processing taxes.

(B) The lint cotton, upon the processing of which the taxes covered by this suit were imposed, was acquired by Plaintiff in bales of varying weights, usually approximately [fol. 29] 500 pounds. The processing tax attached, under the Agricultural Adjustment Act, upon the very first steps of processing, that is when the cotton bales were opened to be put into a mixing machine.

(C) Lint cotton is graded into various classifications, depending upon the length of its staple, color and character. Usually, as the first step in the processing of cotton by a cotton mill, bales of different grades of cotton, purchased at different times and under varying circumstances, are mixed or blended together in a mixing machine. The cotton must then be put through processes to prepare the fibres for spinning. The following processes are used: For Carded Yarn, or Cloth, the processes are Opening, Picking, Carding, Drawing (1 to 3 processes), Slubbing, Intermediates and five frames known as Fly Frames. Following this is the Spinning. For Combed Yarn the processes are Opening, Picking, Carding, Sliver Laps, Machine Laps, Combing, Drawing (1 to 3 processes), Slubbing, Intermediates, Second Intermediates, Jack Frames and Spinning. Then Spooling or Winding and Warping follow in both instances. This is followed by the weaving in the case of cloth. During each of said processes certain waste portions and original cotton are separated as waste from the portion which is put into further process in the manufacture of yarn or cloth. Some of these waste portions is marketable and some is not. Different grades and kinds of marketable waste result from each of the above processes. Some of it is simply spun into yarn. Some of it is spun into yarn and then twisted in from 2 to 40 strands. It is then ready for further processing. Additional waste results from the spinning operations.

(D) Some of the yarn produced by the operations described above is woven into fabrics on looms. Some is twisted and some is not twisted, and some is wound on cones, or tubes, or packaged as skeins or warps.

[fol. 30] (E) It is impossible to estimate accurately the length of time which it takes for the cotton to go through all of the various processes described above. In actual practice the operation of the various Departments of a cotton mill are seldom correlated in such a way that a particular lot of cotton moves without interruption through all of the various processes of manufacturing. The processed cotton coming from the carding and combing machines at times may go immediately into the processes above described, and at other times may be held for a period of three or four days, or longer, before it reaches the machines. Similar interruptions may occur between the spinning and weaving operations, and between each of the separate minor processes connected with spinning and weaving. Plaintiff estimates that from the time a bale of cotton is opened and put into the first processes at Plaintiff's plant (and therefore at the time the floor stock and processing tax attached), until the time when the cotton from such bale finds its way into cloth, one of the finished products of the Plaintiff, a period of thirty working days would have elapsed, assuming that Plaintiff's plant in all departments was during said period operated on two daily shifts of eight hours a day, and assuming further that there were no interruptions between the various steps of processing and manufacturing as described above. Nevertheless, in view of the fact that such interruptions do occur, and did occur during the period for which the taxes here in controversy were collected, it is absolutely impossible to estimate the length of time that elapsed between the first processing of any single bale of cotton and the production of any lot of finished goods.

(F) It is impossible to ascertain what amount of the processing tax was paid with respect to the processing of the cotton from which any particular lot of finished goods were produced. The cotton, upon the processing of which [fol. 31] the tax was imposed, does not all find its way into the principal finished products of the Plaintiff. As explained above, some of it goes into marketable waste and some goes into non-marketable waste. The percentage of

a bale of lint cotton, or even of the original mixture of lint cotton, which goes into waste varies widely, depending upon the grade of cotton, the length and uniformity of its staple, its original moisture content, and other inherent qualities.

(G) Even if there were a uniform and ascertainable percentage of waste resulting from the processing of any particular lot of lint cotton, it would be impossible to allocate or apportion the tax paid upon the first processing of such lint cotton as between the principal finished products and the by-products of a cotton mill. If such tax should be apportioned between the principal finished products and the marketable waste of a cotton mill upon the basis of comparative values of such products and by-products, the absurd result would be reached of apportioning the entire amount of tax paid upon the processing of the original lint cotton as between products resulting from the manufacture of only a part of the original lint cotton, leaving no part of the tax to be apportioned to the non-marketable waste, which is produced from the processing of the original lint cotton upon which the tax was imposed. Moreover, the comparative values of the finished products and by-products, i. e., the various classes of marketable waste, vary from day to day and no uniform apportionment could be made.

(H) On the other hand, if the floor stock and processing tax should be apportioned between all of the materials resulting from the processing of the original lint cotton upon the basis of comparative weights, the result would be that a part of the tax would be apportioned to non-marketable waste and a part would be apportioned to certain classes [fol. 32] of marketable waste which must be sold by the cotton mill at a price per pound less than the rate of tax paid on the processing of original lint cotton.

(I) Even if it were possible to ascertain the amount of the tax imposed upon the processing of the cotton from which a particular lot of finished goods was produced, it would be inherently impossible to ascertain whether the cotton mill has "included such amount in the price of the article with respect to which it was imposed or of any article processed from the cotton with respect to which it was imposed"; and it would also be inherently impossible to ascertain whether the cotton mill has "passed on any part of such amount to the vendee or to any other person."

(J) The Plaintiff, like other cotton mills, sells its finished products in a competitive market and the prices which Plaintiff is able to charge for its products are subject to wide fluctuations and frequent changes. Such prices are affected by the laws of supply and demand, the changing purchasing capacity of the people who buy the products of the cotton mill, changing labor conditions in, and the extent of Governmental regulation in, such trades as make use of the cotton mill's products for further processing and manufacturing, and a myriad of circumstances that cannot be recognized or identified in detail. Plaintiff alleges that it is impossible to ascertain whether and to what extent the imposition of said floor stock and processing taxes affected the market price of the finished products of the kind manufactured by Plaintiff, and it is therefore impossible to ascertain whether and to what extent the price received by Plaintiff for its finished products was increased on account of the imposition of said floor stock and processing taxes. Plaintiff alleges further that it is inherently impossible to ascertain, in the case of any particular sale of its products, manufactured from cotton upon the processing of which said [fol. 33] taxes were imposed, whether the profit was as great, or the loss was as small, as it would have been if said floor stock and processing taxes had never been imposed. Plaintiff alleges further that it is inherently impossible to ascertain the profit which Plaintiff would have made, or the loss which Plaintiff would have sustained on any particular sale of its products, or during any particular time unit during the period covered by this suit, if said floor stock and processing tax had never been imposed.

(K) Even if it should be assumed that it were possible to ascertain that Plaintiff was able to increase the prices charged for its products, by the amount of the floor stock and processing tax, it would still be inherently impossible to ascertain to what extent the increased prices deterred purchasers from buying Plaintiff's products, and therefore the extent of loss which Plaintiff suffered as a result of the unlawful imposition of the floor stock and processing tax. Any decrease in production caused by decreased demand increased Plaintiff's manufacturing cost and overhead burden per pound, and in such instances decreased Plaintiff's profits on sales actually made.

(L) Even if it were possible to ascertain in the case of a particular sale of Plaintiff's products that the price charged by Plaintiff was not any greater than it would have been if the floor stock and processing tax had never been imposed, and even if it were possible to ascertain, in the case of the purchase of any particular lot of lint cotton by the Plaintiff, that the price paid by the Plaintiff was not any less than it would have been if the floor stock and processing tax had never been imposed, it would still be inherently impossible for Plaintiff to satisfy the conditions imposed by Section 21(d)(1) for the reason that it would be inherently impossible for Plaintiff to trace the cotton content of the goods covered by any particular sale of Plaintiff's finished products back to the particular purchase of the lint cotton from [fol. 34] which such finished goods were produced. This impossibility results from the delays and interruptions in the various processes of manufacturing which have been described above. Plaintiff's records were not kept in such a way, nor could they have been kept in such a way, as would have enabled Plaintiff to earmark or identify the cotton content of any lot of its finished products with reference to the particular purchases of lint cotton from which such goods were produced. Section 21(d)(1) clearly conditions Plaintiff's right of recovery upon the establishment, with respect to each particular sale, that the tax was neither passed on in the selling price of the finished product, nor passed back by a reduction in the purchase price of the lint cotton from which such finished goods were produced. Plaintiff alleges that there is an inherent impossibility of making such proof in any case.

Joseph B. Brennan, Sutherland, Tuttle & Brennan,
Atlanta, Georgia, Attorneys for Plaintiff.

The foregoing amendment read and considered. The same is allowed subject to demurrer.

This 12th day of June, 1936.

David J. Davis, United States Judge.

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO MOTION TO DISMISS BILL OF COMPLAINT—Filed June 12, 1936

Comes the defendant, by Jim C. Smith, United States Attorney for the Northern District of Alabama, and by leave of court first had and obtained, amends his motion to dismiss the bill of complaint, as amended, and, in support thereof, assigns, separately and severally:

4. Plaintiff's complaint, and each count thereof, as amended, is insufficient to confer jurisdiction upon this Court to hear and determine upon the merits thereof the matters sought to be alleged therein for the following reasons:

A. The Agricultural Adjustment Act, as amended by Act of Congress of August 24, 1935, in Section 21(g) thereof, provides:

"The provisions of Section 3226 Revised Statutes, as amended, are hereby extended to apply to any suit for the recovery of any amount of any tax, penalty, or interest, [fol. 36] which accrued, before, on, or after the date of the adoption of this amendment under this title, (whether an overpayment or otherwise), and to any suit for the recovery of any amount of tax which results from an error in the computation of the tax or from duplicate payments of any tax, or any refund or credit authorized by subsection (a) or (c) of Section 15, Section 16, or Section 17 of this title or any refund or credit to the processor of any tax paid by him with respect to articles exported pursuant to the provisions of section 317 of the Tariff Act of 1930."

And Section 3226 Revised Statutes, (Section 1672, Title 26, U. S. C. A.) provides that:

"No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for re-

fund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."

And defendant says that Section 21(d) (1) of the aforementioned Agricultural Adjustment Act as amended, provides in part for what must be contained in said claim for refund, and that the plaintiff has not, either in its claim for refund or in its complaint, and each count thereof, alleged any facts showing a compliance with said sections, and that in consequence thereof, this court is without jurisdiction to permit the plaintiff to maintain this suit and without jurisdiction to award a judgment for recovery of the taxes sought.

B. It is not alleged in said complaint, and each count [fol. 37] thereof, as required by law that "neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount", and defendant says that, without such allegations being made in said count by the plaintiff, this court is without authority and jurisdiction to permit the maintenance of this suit, or to render a judgment in favor of the plaintiff.

C. For that it affirmatively appears from the allegations of said count that the plaintiff has not complied with the conditions prescribed by law for the maintenance of this suit in this court, said conditions being those prescribed by Section 3226 Revised Statutes and Section 21(d) 1 to 21(g) of the Agricultural Adjustment Act, as amended by Act of August 24, 1935, to which reference is hereby made.

Jim C. Smith, United States Attorney, Attorney for the Defendant.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO COMPLAINT—Filed July 3, 1936

Now Comes the Plaintiff in the above entitled cause, and, with leave of court first had and obtained, amends its complaint heretofore filed in the following particulars:

I. By adding a new paragraph to each of the counts of the original complaint, to be known as paragraph 27, as follows:

27

On June 22, 1936, the President approved the Revenue Act of 1936, Public Law No. 740, 74th Congress, Title VII of which relates to "refunds of amounts collected under the Agricultural Adjustment Act." In so far as the provisions of said Act purport to afford a defense to actions for the recovery back of floor stock and processing taxes illegally collected under the AAA, said provisions are unconstitutional and inapplicable for the following reasons:

(a) Section 902 of the Revenue Act of 1936 is repugnant to the due process clause of the Fifth Amendment to the Constitution, in that it undertakes to impair and destroy [fol. 39] the vested right of action which Plaintiff had against Defendant for the recovery back of floor stock and processing taxes which the Defendant had illegally collected from Plaintiff, as described in the original complaint. Said Section 902 undertakes to impair and destroy said vested right of action by imposing upon taxpayers, as a condition precedent to recovery, the burden of proving facts which are not susceptible of proof, and the proof of which is inherently impossible in any case.

(b) Section 902 is repugnant to the due process clause of the Fifth Amendment to the Constitution in that said Section undertakes to impose conditions, which are vague, uncertain and unintelligible, and which therefore cannot be complied with, on the recovery of floor stock and processing taxes illegally collected, and said Section thereby undertakes to impair and destroy Plaintiff's vested right of action for the recovery of such taxes.

(c) Assuming that the conditions on recovery imposed by Section 902 are not inherently impossible to prove, said

Section is repugnant to the due process clause of the Fifth Amendment to the Constitution, in that the conditions imposed by said Section are arbitrary and unreasonable; and even if the burden of floor stock and processing tax had been shifted by the taxpayer to others, as described in Section 902, Plaintiff cannot, for that reason, consistently with due process of law, be deprived of the right to recover such floor stock and processing taxes as have been illegally collected from it.

(d) Section 903 of the Revenue Act of 1936 is inseparably connected with Section 902 and other provisions of Title VII of said Act which are unconstitutional, and said Section cannot therefore afford a defense to this action.

(e) Section 904 of said Act is expressly made inapplicable to processing taxes, and said Section, as applied to floor [fol. 40] stock taxes; is inseparably connected with Section 902 and other provisions of Title VII of the Revenue Act of 1936, which are unconstitutional, and said Section 904 therefore cannot afford a defense to this action.

(f) Section 906 of the Revenue Act of 1936 is repugnant to the due process clause of the Fifth Amendment to the Constitution, in that said Section arbitrarily and unreasonably restricts and denies Plaintiff's right to a fair administrative remedy. Section 906(d) purports to give claimants the right to have witnesses subpoenaed, and to authorize the so-called "presiding officer" to require, by subpoena, the attendance and testimony of witnesses, but no provision is made for the enforcement of such subpoenas, or for penalties for failure to answer and comply with same. Section 906 provides for a hearing to be conducted by a so-called "presiding officer", who is to recommend findings of fact and a decision, but the findings of fact and decision are to be rendered by the Board of Review, which shall not have heard the evidence. Section 906 does not limit the presiding officer, in his recommendations, or the Board, in its findings and decision, to a consideration of the evidence adduced at the hearing. Such procedure lacks due process of law.

(g) Section 906 is repugnant to Article III of the Constitution and the constitutional requirement of the separation of powers, in that said Section undertakes to confer upon constitutional courts duties which are not judicial in

nature, and said Section also undertakes to deprive such courts of their inherent judicial powers in matters falling within their appointed jurisdiction.

(h) Section 906 is repugnant to the Seventh Amendment to the Constitution, in that it undertakes to deprive processors of the right to a jury trial in an action against a collector of internal revenue for the recovery back of floor [fol. 41] stock and processing taxes illegally collected, said action being one at common law against the Collector personally.

(i) Section 907 of the Revenue Act of 1936 is repugnant to the due process clause of the Fifth Amendment, to Article III and to the constitutional requirement of the separation of powers, in that said Section undertakes to create a presumption which is arbitrary and unreasonable. There is no rational connection between the facts to be proved and the ultimate facts to be presumed under said Section. The statutory presumption created by Section 907 rests upon a false hypothesis and assumption of facts. Said presumption is in effect made irrebuttable and conclusive, in that Section 907(e) provides for rebutting the presumption only by proof of the actual extent to which the claimant shifted to others the burden of the processing tax, a matter which is not susceptible of legal proof. The enumeration of certain particulars in which Section 907 violates the constitutional provisions cited in this sub-paragraph are not stated as being exclusive.

(j) Sections 902 and 907 violate the due process clause of the Fifth Amendment in arbitrarily and unreasonably shifting to taxpayers the burden of proof with respect to an alleged defense to proceedings for the recovery of taxes illegally collected.

(k) The inherent impossibility of establishing the conditions imposed by Section 902 is apparent from the facts alleged in the subparagraphs of paragraph 26 of each count as amended June 12, 1936.

(l) Section 910 of the Revenue Act of 1936 is repugnant to the due process clause of the Fifth Amendment, in that it undertakes to destroy the vested right of action which Plaintiff and other taxpayers had against the Collector of Internal Revenue personally for the recovery back of floor

[fol. 42] stock and processing taxes illegally collected under the unconstitutional AAA.

W. A. Sutherland, Joseph B. Brennan, Attorneys for Plaintiff.

The foregoing amendment read and considered. The same is allowed subject to demurrer.

This 3rd day of July, 1936.

David J. Davis, United States Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMURRER OF DEFENDANT—Filed June 12, 1936

Comes the Defendant and demurs to the complaint and each count thereof, separately and severally, and to the complaint, as amended, and to each count thereof, separately and severally, as amended, and assigns, as grounds of said demurrer, each of the grounds set forth in his motion, as amended, and here assigns, separately and severally, each of the grounds, separately and severally, contained in said [fol. 43] motion, as amended, to dismiss this cause, which motion is on file in this cause, and to which reference is hereby made for a description of said grounds of demurrer.

In addition to the grounds contained in said motion to dismiss, as same has been amended, the defendant assigns separately and severally the following additional grounds of demurrer:

1-A. It is not alleged in said count, except by way of conclusion of the pleader, that the plaintiff prior to the institution of this suit complied with the conditions precedent to the maintenance in this court of this cause of action.

2-A. It does not appear from the allegations of said count that prior to the institution of this suit a claim for refund as prescribed by the Agricultural Act as amended by Act of August 24, 1935, was presented to the Commissioner of Internal Revenue and by him denied.

3-A. It does not appear from the allegations of said count that prior to the institution of this suit the plaintiff

presented to the Commissioner of Internal Revenue a claim for refund, based upon the grounds set forth in Section 21 (d) (1) of the Agricultural Adjustment Act, as amended by Act of August 24, 1935, and that such a claim was by said Commissioner denied.

4-A. The allegations of said count that Section 21 (d) (1) of the Agricultural Adjustment Act, as amended, is unconstitutional, are mere conclusions of the pleader.

5-A. The allegations of said count, as amended, that it is impossible for the plaintiff to establish the proof required by Section 21 (d) (1) of the Agricultural Adjust-
[fol. 44] ment Act, as amended by Act of August 24, 1935, are insufficient to warrant the court in concluding as matter of law that said Section is unconstitutional in such form and fashion as to relieve the plaintiff from complying with its terms prior to the institution of this suit.

6-A. It is not alleged in said count, as amended, that prior to the institution of this suit the plaintiff made any attempt to comply with the terms of Section 21 (d) (1) of the Agricultural Adjustment Act, as amended.

7-A. For aught that appears from the allegations of said count, as amended, other parties having claims for refund under said Act of Congress are and will be able, prior to instituting suits, to comply with the terms and conditions set forth and prescribed by Section 21 (d) (1) of the Agricultural Adjustment Act, as amended.

Jim C. Smith, U. S. Attorney, Attorney for Defendant.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO DISMISS, ETC.—Filed June 13, 1936

This cause coming on for hearing on this the 12th day of June, 1936, come the parties herein, the plaintiff, by Messrs. Sutherland, Tuttle & Brennan, its counsel, and the defendant, by Mr. Jim C. Smith, United States Attorney for the Northern District of Alabama, and the plaintiff moves the court to permit an amendment to its complaint,

which motion is allowed, and said amendment in writing is ordered filed; thereupon the defendant moves the court to allow the defendant to withdraw the demurrer heretofore filed and to substitute therefor a motion in writing to dismiss the complaint, as amended, which motion is hereby allowed, and said demurrer is ordered withdrawn; thereupon the motion in writing heretofore filed in said cause is allowed; thereupon defendant asks leave of the court to amend said motion to dismiss, and leave of court is granted the defendant to amend said motion and said amendment in writing is hereby allowed; the court understanding said motion, as amended to dismiss the complaint and each count thereof, as amended, overrules and denies said motion, as amended, to which action of the court de- [fol. 46] fendant excepts, which exception is hereby allowed; thereupon the defendant files and interposes a demurrer to the complaint, as amended, and to each count of the complaint, as amended, and said demurrer is argued by respective counsel, and the court not now being ready to announce its decision upon said demurrer and the questions raised thereby, takes the same under advisement.

Done this the 12th day of June, 1936.

David J. Davis, United States District Judge.

In United States District Court

[Title omitted]

Amendment to Demurrer—Filed June 25, 1936

Now comes the Defendant in the above-entitled cause and by leave of Court first had and obtained, amends the demurrer heretofore filed in this cause by adding thereto the following separate and several grounds:

1 (b). That this Court does not have jurisdiction of the matters and things complained of in the complaint and to render judgment in favor of the Plaintiff on the allegations contained in said complaint, and each count thereof, [fol. 47] for the reason that under the Revenue Act of 1936, which was signed by the President of the United States on June 23, 1936, it is provided in Section 901 thereof that Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Ad-

justment Act, as amended August 24, 1935, are repealed, and that by Section 904 thereof it is provided that:

"Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought."

And that by Section 906 (a) thereof it is provided that notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax under the Agricultural Adjustment Act, except as provided in said section, and Defendant says that there is nothing contained in said section which authorizes the maintenance of this suit which was brought and instituted prior to the enactment of said statute.

[fol. 48] 2 (b). For that it affirmatively appears from the allegations of said complaint, and each count thereof, that the Plaintiff has not complied with Sections 902, 903, 904, 906, and 907, respectively, and each subdivision thereof, respectively, of the Revenue Act of 1936, which was signed by the President of the United States and became law on June 23, 1936, and each of the sections is hereby referred to and adopted the same as if specifically herein copied.

Wherefore, the Defendant says that this Court no longer has jurisdiction to permit the Plaintiff to maintain this suit in this Court and no longer has jurisdiction to render judgment in this cause in favor of the Plaintiff and against the Defendant. Jim C. Smith, United States Attorney.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO DEMURRER—Filed July 6, 1936

Now comes the Defendant in the above-entitled cause and by leave of Court first had and obtained, further [fol. 49] amends the demurrer heretofore filed in this cause by adding thereto the following separate and several grounds:

3(b). It is not averred in said count, except by way of conclusion, that the sections, separately and severally, of the Revenue Act of 1936 therein mentioned are unconstitutional;

4(b). It affirmatively appears from the allegations of said count that the plaintiff has not complied, or attempted to comply, with the provisions of Section 906 of the Revenue Act of 1936, and that the Plaintiff would have the Court to assume jurisdiction in this cause and render judgment without the Plaintiff having complied, or attempted to comply, with the provisions of said section;

5(b). For that since the enactment of Sections 9 and 10 of the Revenue Act of 1936, which sections are hereby adopted and referred to as fully as if set out herein, the Defendant Collector of Internal Revenue is not in any way liable to the Plaintiff;

6(b). For that it is not averred in said count that the Defendant Collector, in committing the acts alleged therein, did so wilfully and intentionally;

7(b). For that it affirmatively appears from allegations of said count that the Defendant Collector, in committing the acts alleged therein, did so in the performance of his duties under the provisions of the Agricultural Adjustment Act and that the Defendant Collector acted under the direction of the Commissioner of Internal Revenue of the United States in collecting the money mentioned and claimed in said count;

8(b). For that under the provisions of Sections 902 to 912, both inclusive, of the Revenue Act of 1936, which sections respectively are hereby referred to as fully as if set

out herein and hereat, this Court does not have jurisdiction to render a judgment herein on the allegations contained in [fol. 50] said count in favor of the Plaintiff and against the Defendant Collector;

9(b). For that it affirmatively appears that since the enactment of Sections 902 to 912, both inclusive, of the Revenue Act of 1936, the United States of America is a proper party to this suit and the said United States of America has not consented to be sued in this Court for the matters and things set forth and alleged in said count of Plaintiff's complaint as last amended, but that on the contrary, the Congress of the United States has expressly declined to give its consent for the United States of America to be sued in this Court upon said allegations;

10(b). For that the allegations of said count, in substance, to the effect that it is impossible for the Plaintiff to comply with Sections 902 to 914, both inclusive, of the Revenue Act of 1936, are mere conclusions of the pleader, and it does not appear therefrom that other parties having like claims against the Government and who kept proper books of accounting in respect to said taxes are unable to comply therewith.

Jim C. Smith, United States Attorney.

[fol. 51] In United States District Court, Northern District of Alabama, Southern Division

At Law. No. 4570

Lincoln Mills of Alabama, a Corporation, Plaintiff,

v.

Harwell G. Davis, Individually and as Collector of Internal Revenue, Defendant

At Law. No. 4595

Anniston Manufacturing Company, a Corporation, Plaintiff,

v.

Harwell G. Davis, Individually and as Collector of Internal Revenue, Defendant

At Law. No. 4607

STANDARD-COOSA-THATCHER COMPANY, a Corporation, Plaintiff,

v.

HARWELL G. DAVIS, Individually and as Collector of Internal Revenue, Defendant

At Law. No. 4608

SANQUOIT SPINNING MILLS, a Corporation, Plaintiff,

v.

HARWELL G. DAVIS, Individually and as Collector of Internal Revenue, Defendant

OPINION—Filed July 6, 1936

These are suits by plaintiffs against Harwell G. Davis, as Collector of Internal Revenue and individually, to re- [fol. 52] cover floor and processing taxes collected from them under the Agricultural Adjustment Act. The defendant filed a motion to dismiss for want of jurisdiction upon the ground, among others, that there was no averment that the plaintiffs had complied with Section 21(d) of the Amendment of August 24, 1935 to the Agricultural Adjustment Act. Being of the opinion that the same question could be reached by demurrer, I overruled the motion. The defendant demurred upon the same grounds.

Section 21(d) of said Act was repealed by the Revenue Act of 1936. The defendant amended his demurrer by adding the ground that it is not alleged that plaintiffs have complied with Section 902 of the 1936 Revenue Act. This section conditions plaintiffs' right of recovery upon their establishing that they have borne the burden of the tax and have in no way shifted the burden to others.

These are suits in the nature of an action for money had and received. The plaintiffs cannot recover until they show that the defendant has money in his possession which, in morals, equity and good conscience belongs to them. Where plaintiffs sell a shirt, the purchaser pays the tax to them, and they pass it on to the Government, certainly, there is no moral right in them to recover this tax.

Plaintiffs, however, contend that before Section 21(d) of the Agricultural Adjustment Act and Sections 902, 906 and 907 of the Revenue Act of 1936 were enacted they had a vested right; that these Sections placed an impossible burden on them and deprived them of this right; and that said Sections are unconstitutional. In my opinion, all of these questions were decided adversely to plaintiffs in the case of United States v. Jefferson Electric Manufacturing Company, 291 U. S. 386.

[fol. 53] The Electric Company manufactured and sold in the open market ignition coils. The plaintiffs manufactured and sold in the open market cotton goods. The Electric Company bought in the open market iron, copper, coal and other things used in the manufacture of the coils. The plaintiffs bought in the open market cotton, coal, starch and other things used in the manufacture of cotton goods. Both used labor in manufacturing their products. The Electric Company paid a sales tax accruing when the goods were sold. The plaintiffs paid a processing tax accruing when cotton was opened for processing.

The taxes in both cases have been definitely ascertained. The sales price is definite. It is as easy in the one case as in the other to determine the costs of the finished product. That part of the tax paid by the seller of the raw material can be found by the use of a reasonable test time before, during and after the tax period.

With this information, it will be no more difficult to determine the amount of the tax passed on than in the Electric Company Case. The Court said in the Electric Company case:

"We do not perceive in the restriction any infringement of due process of law. If the taxpayer has borne the burden of the tax, he readily can show it; and certainly there is nothing arbitrary in requiring that he make such a showing. If he has shifted the burden to the purchasers, they and not he are the actual sufferers and are the real parties in interest."

Orders will be made in conformity with this opinion.

David J. Davis, United States District Judge.

[fol. 54] In United States District Court for the Southern Division of the Northern District of Alabama

At Law. No. 4595

Anniston Manufacturing Company, a Corporation, Plaintiff,

v.

Harwell G. Davis, Individually and as Collector of Internal Revenue, Defendant

Order Sustaining Defendant's Demurrer—Filed July 6, 1936

This cause again coming on for hearing on this the 6 day of July, 1936, the Plaintiff requests leave to amend its complaint by separate paper filed herein, which amendment is hereby allowed.

Thereupon, the Defendant refiles his motion, as amended, to dismiss the complaint, as last amended, and the Court understanding said motion, as amended, denies and overrules the same, to which action of the Court the Defendant duly excepts, which exception is allowed;

Thereupon, the Defendant refiles his demurrer, as amended, and each ground thereof, as amended to each count, separately and severally, of the plaintiff's complaint, as last amended, and in addition thereto requests leave to amend said demurrer by separate paper filed herein on June 25, 1936, and also by separate paper this day filed, which amendments to said demurrer are hereby allowed.

The Court, being fully advised in the premises, is of the opinion that the Defendant's demurrer, as last amended, should be sustained, and it is, therefore, by the Court:

[fol. 55] Ordered, Adjudged and Decreed that the Defendant's demurrer, as last amended, be and the same is hereby sustained, to which ruling of the Court the Plaintiff excepts, which exception is hereby allowed;

And the Plaintiff declining to plead further, it is:

Ordered, Adjudged and Decreed by the Court that the Defendant go hence without day and recover of and from the Plaintiff his costs herein, for which execution may issue. Exception of Plaintiff allowed.

Done this 6 day of July, 1936.

David J. Davis, United States District Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed July 10, 1936

To the Honorable David J. Davis, Judge of the United States District Court for the Northern District of Alabama:

The above named Petitioner, Anniston Manufacturing Company, a corporation, considering itself aggrieved by the [fol. 56] judgment rendered and signed on July 6, 1936, in the above entitled cause, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and it prays that this appeal may be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fifth Circuit under the rules of such court in such cases made and provided.

This 10th day of July, 1936.

W. A. Sutherland, Joseph B. Brennan, Attorneys for Petitioner.

ORDER ALLOWING APPEAL

Upon due consideration of the foregoing petition for appeal, it is ordered that the appeal herein be allowed as prayed for, and it is further ordered that a certified transcript of the record and all proceedings be transmitted to the United States Circuit Court of Appeals for the Fifth Circuit. It is further ordered that the bond on appeal be fixed at the sum of Five Hundred Dollars, to be approved by this Court.

This 10th day of Juply, 1936.

David J. Davis, United States Judge.

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 10, 1936

Now comes the said Anniston Manufacturing Company, Plaintiff in the above cause, and files the following assignment of errors, upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause, from the judgment of this court entered on the 6th day of July, 1936.

1

The Court erred in sustaining Defendant's General Demurrer to the complaint as amended, and by deciding that the facts stated in the complaint as amended were not sufficient to constitute a cause of action.

2

The Court erred in rendering final judgment for the Defendant.

3

The Court erred in sustaining Defendant's Demurrer to the first count of the complaint as amended, and by de-
[fol. 58] ciding that the facts stated in said count were not sufficient to constitute a cause of action.

4

The Court erred in sustaining Defendant's Demurrer to the second count of the complaint as amended, and by deciding that the facts stated in said count were not sufficient to constitute a cause of action.

5

The Court erred in failing to hold that Sections 902, 903, 904, 906, 907 and 910 of the Revenue Act of 1936 (Public Law No. 740, 74th Congress) are unconstitutional and inapplicable for each of the reasons set forth in the amendment to the complaint herein filed and allowed on July 3, 1936.

Wherefore Plaintiff prays that said judgment may be reversed, and for such other and further relief as to the Court may seem just and proper.

Dated July 10th, 1936.

W. A. Sutherland, Joseph B. Brennan, Attorneys for Plaintiff.

Presented this July 10, 1936. David J. Davis, U. S. District Judge.

[fols. 59-61] Bond on appeal for $500.00, approved and filed July 10, 1936, omitted in printing.

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 10, 1936

To the Clerk of the Above Court:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers and exhibits, to-wit:

1

The original complaint filed in the office of the Clerk of the District Court on the 22nd day of November, 1935.

2

First amendment to complaint and order allowing same dated and filed on June 12, 1936.

3

[fol. 63] Second amendment to complaint and order allowing same, dated and filed on July 3rd, 1936.

4

Defendant's original demurrer filed on the 12th day of June, 1936.

5

Amendment to Defendant's demurrer filed on June 25, 1936, and allowed July 6, 1936.

6

Further Amendment to Defendant's Demurrer filed and allowed on July 6, 1936.

7

Opinion of the Court on demurrer filed July 6, 1936.

8

Order and judgment of the court made and entered on the 6th day of July, 1936.

9

Petition for appeal, with date of filing.

10

Order allowing appeal, with date of filing.

11

Assignment of errors, with date of filing.

12

Citation on appeal and acknowledgment of service thereon, with date of filing.

[fol. 64] 13

This præcipe with acknowledgment of service thereon, with date of filing.

14

Certificate of the Clerk to the correctness of the record as to præcipe.

W. A. Sutherland, Joseph B. Brennan, Attorneys for Plaintiff.

Due and legal service of the within and foregoing præcipe is hereby acknowledged, and all other and further service is hereby waived.

This 10th day of July, 1936.

Jim C. Smith, United States Attorney, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S PRÆCIPE FOR RECORD—Filed July 11, 1936

To the Clerk:

Please incorporate in the record, as Defendant's præcipe, the following, in addition to the præcipe of the Plaintiff:

[fol. 65] Motion to dismiss filed on April 22, 1936.

Amendment to said motion filed on June 12, 1936.

Any and all orders entered on or in connection with said motions.

The order of court entered on June 12, 1936.

This the 11th day of July, 1936.

Jim C. Smith, United States Attorney.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 66] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of October 19th, 1936

No. 8175

ANNISTON MANUFACTURING COMPANY, a Corporation,

versus

HARWELL G. DAVIS, Collector of Internal Revenue

On this day this cause was called, and, after argument by Joseph B. Brennan, Esq., and W. A. Sutherland, Esq., for appellant, and M. H. Eustace, Esq., Special Assistant to Attorney General, for appellee, was submitted to the Court.

[fol. 67] OPINION OF THE COURT—Filed January 8th, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8175

ANNISTON MANUFACTURING COMPANY, a Corporation, Appellant,

versus

HARWELL G. DAVIS, Collector of Internal Revenue, Appellee

No. 8186

LINCOLN MILLS OF ALABAMA, a Corporation, Appellant,

versus

HARWELL G. DAVIS, Individually and as Collector of Internal Revenue for the District of Alabama, Appellee

Appeals from the District Court of the United States for the Northern District of Alabama

(January 8, 1937)

Before Foster, Hutcheson and Holmes, Circuit Judges

HUTCHESON, Circuit Judge:

Actions against the Collector for refunds of cotton processing and floor stock taxes, paid by appellants under

[fol. 68] the 1933 Agricultural Adjustment Act[1] these suits were brought before and heard on demurrers after the enactment of the Revenue Act of June 22, 1936,[2] This Act adopted and purportedly made adequate provision as to amounts collected under the Agricultural Adjustment Act for the administrative and judicial enforcement of the principle given authoritative sanction in United States vs. Jefferson Electric Co., 291 U. S. 386, that refunds of taxes illegally collected might properly be limited to those as to which the taxpayer could show that he bore the burden of the tax; that is, that the tax was really exacted from him, and not through him from others.

The Act in question makes comprehensive provisions to attain the end desired, that sums collected and paid out by the Government as taxes under Congressional sanction, to carry out a plan esteemed to be for the general welfare, should not be paid back to those who were merely conduits through which the stream of public contributions to the plan were poured into the Treasury. These are the controlling provisions of the Act as they are adequately summed up in the Government's brief:

"Sec. 644, provides that no refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid as tax under the Agricultural Adjustment Act unless the claimant establishes to the satisfaction of the Commissioner or to the satisfaction of the trial court or Board, that he has borne the burden of such amount, or that he had repaid unconditionally such amount to his vendee who bore the burden thereof.

Section 645 provides that no refund shall be made or [fol. 69] allowed of any amount paid as tax under the Agricultural Adjustment Act unless after the enactment of this Act and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath."

Note 1. Title VII, U. S. C. A. Secs. 601, et seq.

Note 2. Making provisions for refund of amounts collected under the Agricultural Adjustment Act the new provisions, c. 690 Secs. 902 to 917, 49 Stat. 1747 to 1755 are included in Title VII, U. S. C. A. Sec. 644 to 659.

Section 646 provides that notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery • • • of • • • any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. This condition does not apply to amounts defined as processing tax by Section 913."

Section 647 confers jurisdiction upon the District Courts concurrent with the Court of Claims of all cases regardless of the amount involved, except suits for refund of amounts paid as processing tax, if they would otherwise have had jurisdiction except for the amount in controversy."

Subsection (a) of Section 648 provides that notwithstanding any other provision of law no suit or proceeding [fol. 70] for the recovery of any amount paid as processing tax, as defined by Section 913, whether brought before or after the date of enactment of the Act, shall be brought or maintained in any court except as provided in that section. Subsection (b) establishes in the Treasury Department a Board of Review, consisting of nine members designated by the Secretary of the Treasury, which is given exclusive jurisdiction to review the allowance or disallowance by the Commissioner of claims for refund of amounts paid as processing tax. Subsections (c) and (d) provide for the filing of petitions with the Board of Review, and for a full hearing, after notice, upon the merits of the taxpayer's claim. Proceedings before the Board of Review are open to the public, are to be conducted in accordance with such rules of practice, (other than rules of evidence) as the Board may prescribe, and are to be conducted with the rules of evidence applicable in the courts of equity of the District of Columbia. The Chairman is authorized to divide the Board into divisions (subsection (b)) and the hearing may be held before a division (subsection (d)). By subsection (e) The Board and its divisions are required to make writ-

ten findings of fact and a decision in each case. The findings and decision of a division become the findings and decision of the Board unless within thirty days the Chairman orders such findings and decision reviewed by the Board. Subsection (g) provides for review by the Circuit Court of Appeals and the Court of Appeals for the District of Columbia for errors of law upon petition of the taxpayer or the Commissioner. Further review by the Supreme Court upon certiorari is also authorized."

[fol. 71] Section 649 creates certain presumptions intended to simplify the proof required under Section 604 to establish the extent to which the claimant has borne the burden of the tax sought to be recovered. Under subsection (a) a showing that the "average margin" (as defined by the Act) per unit of commodity processed was lower during the tax period than it was during stated periods before and after the tax period creates a prima facie presumption that the claimant bore the burden of the tax, while a showing that the average margin during the tax period was not lower is made prima facie proof that the claimant did not bear the burden. By subsection (e) either the claimant or the Commissioner is permitted to rebut the presumption created by subsection (a) by showing the extent to which the claimant shifted the burden to others. The section further indicates certain matters which may be proved to overcome the presumption."

Section 652; provides that no Collector of Internal Revenue or Customs, or internal revenue or customs officer or employee, shall be in any way liable to any person for any act done by him in the assessment or collection of any amount as tax under the Agricultural Adjustment Act or for the recovery of any amount so collected and paid into the Treasury in performance of his official duties under the provisions of such Act, or if such Collector or officer acted under the direction of the Secretary or other proper officer of the Government.

Thus it appears that as to processing taxes, the consent of the United States to be sued in the District Court is completely withdrawn. Such court review as is provided for as to these is in the Circuit Court of Appeals and the Supreme Court for errors of law. As to other tax refund claims still [fol. 72] suable in the District Court new and different prerequisites to suit are provided.

Neither of the appellants alleged conformity with the Act; indeed, both, setting it at naught, undertook to sue in spite of it. Responding to appellee's motions to dismiss for want of jurisdiction, and his demurrers to their petitions, that they stated no cause of action, each took the position that the Act was without effect as to causes of action, accrued and begun against the Collector before its passage.

This position was supported by rather feebly urging that the Act did not purport to, it did not, affect claims already accrued, and already in suit, and by urging firmly and with confidence, that if it did, it would be in violation of the due process clause of the Fifth Amendment, as depriving them of their vested right to sue the Collector for wrongs done them by him. The District Judge thought the Jefferson Electric Co. case controlling. He sustained defendant's demurrers, and plaintiffs declining to plead further, dismissed their actions. Both plaintiffs are here vigorously attacking his rulings and orders.

The arguments orally and in the briefs took wide range, but they all were concerned with, they came down at last to the power of the Congress to subject plaintiffs' claims to the refund provisions of the June 1936 Act. For it too plainly appeared to be contested, indeed, it was in effect conceded, that that Act was intended to, and if valid, did, prevent the maintenance of the suits plaintiffs had brought.

It is not claimed here, as indeed it could not be, that the Act was not effective to withdraw the consent of the United States to be claimed against and sued, and therefore all right to maintain a suit against it for refunds, except under and in strict accordance with the conditions the Act prescribes. Smallwood vs. Gallardo, 275 U. S. 56; Tucker vs. [fol. 73] Alexander, 275 U. S. 228; United States vs. Clark, 8 Pet. 436; Lynch vs. United States, 292 U. S. 571; Dismuke vs. United States, 297 U. S. 167; United States vs. Michel, 282 U. S. 917; The Collector vs. Hubbard, 12 Wall. 1; Cheatham vs. United States, 92 U. S. 85; Rock Island vs. United States, 254 U. S. 141; Arnson vs. Murphy, 115 U. S. 579; United States vs. Chicago Golf Club, 84 Fed. (2d) 914; Ritter vs. United States, 28 Fed. (2d) 265; United States vs. Jefferson Electric Co., supra; Continental Mills vs. United States, — Court of Claims —.

What is claimed and vigorously insisted on is (1) that independent of statutory consent, plaintiffs, before the Act

in question was passed, acquired a vested right against the Collector to hold him to account in a refund action of the kind they had instituted, and that Congress could not take this action away without providing for their use some substantial equivalent of it, and (2) that the right and remedy the Act gave was not only not an equivalent of the right taken away, but in effect a complete denial of it.

Appellee as vigorously espouses the negative of both propositions. He insists that the action appellants have brought is not a non-statutory action against him, indeed, is not truly an action against him at all. It is a kind of John Doe action allowed in part by statutory implication, in part by statutory direction, which, by an amiable fiction to take the place of formal consent, though in name against the Collector, is in substance and effect as to the amount sued for in it, against the United States. Being but a form of action for determining its obligation to refund, to which the United States has consented, it, like any other authorized form of action evidencing consent of the United States to be sued, may at any time be taken away by statute. Appellee takes vigorous issue too, with appellants' position that the provisions for refund the Act makes are intended [fol. 74] to keep the promise to the ear in the reading of them, only to break it to the hope in their working out; that they are intended, in short, to hold out specious, delusive and illusory promises by a tender of administrative machinery, which is so constructed, so geared and so operated as certainly to enmesh and destroy every claim run through it.

The burden of appellants' complaints against the Act and its operation, as it seeks to condition refunds upon proof of its actual burdensomeness to claimants, is that throwing an impossible burden on them, it requires the impossible in proof. They insist that as applied to the business they are in, and the commodities they have handled, to require claimants to establish that they, and they alone, have finally borne the burden of the exactions, is to require the proof of a negative which absolutely cannot be proven, is to in effect fix such conditions upon the refund that its denial is necessarily predetermined.

As to the taxes in question, they have pleaded and they vigorously affirm in their argument that it is not possible to determine whether the taxes were or were not passed on

to others, that is, collected in the sales prices. If included at all, they were, they say, so buried in the price along with other invisible and indivisible elements of cost, that it is impossible to disentangle them and to precisely say where their burden fell. This must not be the case, they say, when refund is denied on the ground that the claimant should not have back moneys which he paid into the Treasury not as exactions from himself, but as collections from others. They point too, to the provisions in the Act as to presumptions and as to procedure, and they say, these are but devices to make more certain the impossibility of proof, and thus to insure, what they declare the purpose of the Act to be, that refunds will not be permitted but prevented.

[fol. 75] Appellee denies this. He insists that though the task is difficult, it is not impossible; though the obstacles in the way of the refund are great, they are not insuperable. He urges at last that they are no more or more onerous than considerations of natural justice and equity require, of one who having conducted its business under a plan and scheme, the purpose and effect of which is to raise the level of farm prices and therefore necessarily of prices all along the line, and having in effect like others in the business were, been constituted a potential tax gatherer and collector through higher prices, to pass the taxes on to, and to collect them from, and pay them for, others into the Treasury, attempts to recover back for itself the sums it paid in.

He insists that the least that should be required of it is to show that though it was expected of it and others similarly situated, that they would pass these taxes on to the general public, and though this was the common and general practice, it did not in fact do so, but itself sustained the burden the general public had been expected to, and generally did bear. He argues that so clearly was it understood, indeed, intended, that in the commercial practices under the Act, the taxes would be distributively passed on, and so generally was this in fact done, that Congress, upon a clear legislative declaration that the passing on was wellnigh universal, might have made the presumptions more vigorous, the conditions of proof before refunds more rigorous and exacting.

Appellee invokes as completely apposite in principle and in application, and therefore controlling as authority, the

refund provisions of the 1928 Act, denying refunds except to those who could prove that they had not passed illegally collected taxes on, as it is approved and discussed in the Jefferson Electric Co. case, supra. They cite also as having bearing here Richardson Lubricating Co. vs. Kinney, [fol. 76] 168 N. E. 886; Standard Oil Co. vs. Bollinger, 169 N. E. 236; and the host of cases denying recovery in tax cases, where to allow it would result in unjust enrichment. Typical of these are Bull vs. United States, 295 U. S. 247; Champ Springs Co. vs. United States, 47 Fed. (2d) 1; Rose vs. McEachern, — Fed. (2d) —.

Appellants insist that the Jefferson Electric case is not authority here, for there, they say, the refund claimant was but a tax gatherer in law and in fact, to gather sales taxes from customers, who were expected to and did pay them, and it was therefore within Congressional competence to provide that having collected the tax from another, he should not obtain a refund for himself. This, they say, is sound doctrine applying in and limited to sales tax cases. Wayne Co. Products Co. vs. Duffy, 155 N. E. 669; Lash's Products Co. vs. United States, 278 U. S. 175.

Interesting as these questions and discussions are, important and farreaching as to tax refunds, as is the principle the Jefferson Electric Company case lays down, desirable as it might be to have the limits of the principle and of the conditions under which it may be applied laid down, we are persuaded that we should not enter upon either a discussion or a decision of them. For we are convinced that appellants have failed to establish their first point, to which the second, which they and appellee so fully discuss, is completely subordinate, that the suits they seek to maintain are really personal suits against the defendant, at common law, to enforce vested rights against him as an individual, and not suits against the United States, consented to by it through the fiction of a suit against the Collector. We are convinced that whatever actions appellants might conceivably have brought or bring against appellee, those they have actually brought against him are not personal, common law actions for moneys had and received, which they [fol. 77] expect him personally to respond to, but precise, statutory actions for refunds from the Treasury in which appellee is not a real, but only a nominal or fictional defendant. The responsibility for the judgment, if obtained,

will not be appellee's. No one, least of all either of the appellants, expects the judgment if obtained, to be really against and to be really satisfied by him. The appellants know that appellee cannot respond to such judgments as they seek, they do not expect him to. Because they know this, and are really looking to the Treasury, they here plead conformity to all the statutory requirements applicable generally to tax refunds. Particularly do they plead that they have filed and prosecuted claims with the Commissioner, and that the Commissioner has finally rejected them. They are looking for satisfaction to the United States. They rely for such satisfaction upon its statutes, providing that the United States shall satisfy judgments against the Collector when obtained for or on account of actions done by him, pursuant to his office.

An examination of the pleadings will show beyond question that this is true. It will show that the cause of action asserted is not a common law action, for moneys had and received, based, as such actions must be, on wrongful seizures and detentions of plaintiffs' moneys by defendant. None of the elements which enter into and condition that action are here present. If then, the actions are to be taken as intended to be personal, common law actions, to be responded to personally by appellee, and not as statutory ones against, and to be responded to by the United States, through the Collector as proxy, the petitions are completely demurrable. But they were not so intended.

In Lincoln's case no effort was made to plead any of the elements of a common law action. It is not claimed that the defendant had money in his hands which he had gotten [fol. 78] from plaintiff, not in pursuance of his duties, but wrongfully, and is withholding from it under circumstances which make it inequitable for him to continue to do so. It is not even pleaded that the moneys plaintiff paid him were paid under duress and protest, and therefore not voluntarily. This is an essential condition to a common law action against the Collector independent of statute, for moneys had and received. Elliott vs. Swartwout, 10 Pet. 137; Cary vs. Curtis, 3 How. 325 and until 1924 it was to the statutory action against him, Moore Ice Cream Co. vs. Rose, 289 U. S. 375; Field, The Effect of an Unconstitutional Statute, p. 251 and cases; State vs. Canfield, 171 N. E. 111; People vs. Ventura, 268 Pac. 347. On the con-

trary, it is pleaded that the moneys were paid over to and collected by appellee in pursuance of his duty to collect them.

Anniston's case was pleaded the same way, until by its amendment, filed June 12, 1936, it alleged without pleading any facts but merely as a conclusion that nearly all of the sums it had paid were paid under duress and protest. But these allegations, are not sufficient to convert the suit, Anniston brought, from the statutory action for refund, allowed by the Congress, to a common law action for moneys had and received independent of statutory grant. For the case is framed as an action for refund. It is definitely pleaded that a claim for refund was made not to the Collector, but to the Commissioner. It is insisted that every step, on which appellant relies, in the statutory refunding process had been gone through to the point of suit. And in its brief appellant makes it more clear that the suit was, in reality not against the appellee, but against the United States, by pointing to the statute 26 U. S. C. A. Sec. 1670(b) authorizing the Commissioner to repay the Collector the full amount of moneys recovered against him in any court for any Internal Revenue taxes collected by him, as well as to 28 U. S. C. A. Sec. 842 providing that upon the giving of [fol. 79] a certificate of probable cause no execution shall issue against the Collector on any judgment against him for moneys he had collected, but the amount so recovered shall be paid out of the Treasury.

In view of the suits plaintiffs have actually brought, and of the state of the authorities as to such suits, the briefs are full of what seems little better than quibbling over whether their actions are common law actions, with statutory limitations, or purely statutory ones. We think it may not be doubted that the whole current of authority is to the effect that the actions they have brought are given by statute, and may not, except in accordance with statutory consent, be maintained. Cary vs. Curtis, 3 How. 235; Barney vs. Watson, 92 U. S. 449; Arnson vs. Murphy, 109 U. S. 238; 115 U. S. 580; Cheatham vs. United States, 92 U. S. 85; Moore Ice Cream Co. vs. Rose, 289 U. S. 373; Rose vs. McEachern, supra.

In Schoenfeld vs. Hendricks, 152 U. S. 693, it is said:

"It was decided by this court in Arnson vs. Murphy, 109 U. S. 238, that the common law right of action against a col-

lector to recover duties illegally collected was taken away by act of Congress, and a statutory remedy given, which was exclusive."

Expressions in Smietanka vs. Indiana Steel Co., 257 U. S. 1; Sage vs. United States, 250 U. S. 33; Graham & Foster vs. Goodcell, 282 U. S. 409; White vs. Hopkins, 51 Fed. (2d) 159; Tait vs. Western Md. Ry., 289 U. S. 620, relied on by appellants as declaring the law to be of a different purport, do not do so. They must be read as applied to the situations specifically dealt with under those decisions and the matters decided in them. They did not purport to deal with the question at issue here, whether the action against the collector for collections made officially would lie at common law independent of the Congressional consent evidenced [fol. 80] by statute. They may not be distorted into an overruling of the long line of cases beginning with Elliott vs. Swartwout, which discuss and point the difference between a common law action against the collector for his wrongful conduct, and the statutory action allowed against him, and through him against the United States, for doing what the law commands, or appears to command, him to do. c/f DeLima vs. Bidwell, 182 U. S. at 177.

It is perfectly plain that appellants have not plead, we think they cannot plead, a common law, indeed without the aid of Congress any action, against appellee. For, as shown at length in the Swartwout and Curtis cases, appellee has done them no actionable wrong. A collector of internal revenue, obligated by statute to collect taxes and pay them daily over to the Treasury, he has done no wrong in doing so, for which an action, equitable in its nature, like that for moneys had and received, will lie against him. The statute is his master, it is likewise his protection and shield. It directs him to collect and pay over; it protects him when he does so. The law, in the absence of a statute giving one, will raise no cause of action against him in favor of those who, like appellants, knowing that moneys were being collected by him officially, paid it over to him and continued to conduct their business under the conditions and on the basis created by the imposition of the tax, without at least requiring them to show, not merely that they paid the moneys to him, but that in doing so they have suffered a real injury. In the absence of such showing, when the collector has paid the money over as the law requires, the equities are

with, rather than against him, and except by statutory consent he may not be sued. Cary vs. Curtis, Schoenfeld vs. Hendricks, DeLima vs. Bidwell, supra, Field, Recovery of Unconstitutional Taxes, pp. 253-4-5.

But, say the appellants, our right of action springs from the fact, our action asserts, that the purported law under [fol. 81] which appellee proceeded was unconstitutional. It was therefore no law, and appellee was a trespasser ab initio, without legal protection or authority. In support of their general proposition that an unconstitutional law is no law, they quote from Norton vs. Shelby County, 118 U. S. 425, at p. 442:

"An unconstitutional act is not a law. It confers no rights; it imposes no duties; it offers no protection, it creates no office. It is, in legal contemplation, as inoperative as though it had never been passed."

But like every other legislative phrase coined arguendo in the process of decision, this phrase leaves something to be desired, when it is lifted from its argumentative setting to be converted into a general legal canon on, indeed, almost a part of, the Constitution itself. When it is attempted, as here, to be given such wide application as not merely to strike down an exaction so that it cannot thereafter be collected, but to support a common law action against a collector for moneys collected and paid into the Treasury by him under color of the law, and as a part of his official duties before the law was declared unconstitutional, it is well to call attention to exactly what was decided in that case, and to the fact that there is abundant authority to the contrary of the position appellants take.

In Norton's case the unconstitutionality went to the existence of the office itself. All that was actually decided there was "there can be no incumbent de facto of an office, if there be no office to fill." United States vs. Royer, 268 U. S. 397. Here the collector's office is not in question. The decision in United States vs. Butler, 297 U. S. 110, that the Agricultural Adjustment Act was unconstitutional did indeed, as declared in Rickert Rice Mills vs. Fontenot, place collectors who should thereafter attempt to collect the tax in [fol. 82] the position of trespassers. That decision did not, nor did that in the Rickert case, declare that as to the collections made in the course of their official duties under that

act before its unconstitutionality was declared, collectors would be liable other than as provided by statute. It may be that if a Congressional Act is on its face so arbitrary and unreasonable, so beyond power, and so violative of natural rights as that any reasonable person must know its invalidity, persons acting under it before its unconstitutionality has been declared will not be protected from a personal accounting. When, however, as in this case, the unconstitutionality of the law was far from plain, no common law action will be raised, we think, against collectors who, before its unconstitutionality has been searched out and declared, have, by virtue of their office collected money and paid it over. Wendt vs. Berry, 154 Ky. 586; State vs. Poulin, 74 Atl. 119, 24 L. R. A. (N. S.) 408 and Note; Lang vs. Bayronne, 68 Atl. 90, 15 L. R. A. (N. S.) 93 and Note; Cooley, Constitutional Limitations, 8 Ed. Vol. 1 page 382 and Note; Field, The Effect of an Unconstitutional Statute, Introduction, pp. 3 to 13, incl. — pp. 251, 252. C/f Miller vs. Standard Nut Margerine Co., 284 U. S. 498; Rickert Rice Mills vs. Fontenot, 297 U. S. 110, as to the effect upon the right to an injunction of judicially declared illegality and unconstitutionality. We think it quite plain that neither appellant showed any right to sue, and that the judgments of dismissal must be affirmed.

We think, however, the weakness of their cases as they have brought them, statutory actions for refund, goes deeper than their mere failure to state a cause of action. Statutory consent to sue the collector in a refund action having been withdrawn, the Court was without jurisdiction to entertain the suits.

The judgments of dismissal are therefore affirmed, not because the pleadings were subject to demurrer, but because consent to bring a refund suit against the collector having [fol. 83] been withdrawn, there was no jurisdiction in the court below to entertain the actions.

Affirmed.

[fol. 84] JUDGMENT

Extract from the Minutes of January 8th, 1937

No. 8175

ANNISTON MANUFACTURING COMPANY, a Corporation,

versus

HARWELL G. DAVIS, Collector of Internal Revenue

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fol. 85] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 66 to 84 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8175, wherein Anniston Manufacturing Company, a corporation is appellant, and Harwell G. Davis, Collector of Internal Revenue is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 65 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 8th day of January, A. D. 1937.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 15, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,207. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 667. Anniston Manufacturing Company, petitioner, vs. Harwell G. Davis, Collector of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed January 21, 1937. Term No. 667, O. T., 1936.

(8756-C)